

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT J. VALESKY, STEPHEN F. GROSS
and TIMOTHY C. MORRIS

Appeal No. 2004-1814
Application No. 09/950,969

ON BRIEF

Before KIMLIN, WALTZ and TIMM, Administrative Patent Judges.
KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-24.
Claim 1 is illustrative:

1. A gel-form air freshener composition comprising:

(a) a linear alcohol alkoxyate in an amount of not more than about 7% by weight;

(b) an amine oxide in an amount of not more than about 10% by weight;

(c) a fragrance component in an amount of not more than about 10% by weight; and

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(d) an aqueous gel base in an amount of not more than about 96% by weight, all weights being based on the total weight of the gel-form air freshener composition.

The examiner relies upon the following references as evidence of obviousness:

Streit et al. (Streit)	4,178,264	Dec. 11, 1979
Steer	4,755,377	Jul. 5, 1988

Milton J. Rosen, Surfactant and Interfacial Phenomena 134-41
(John Wiley & Sons Inc. 1978)

Appellants' claimed invention is directed to a gel-form air freshener comprising an aqueous gel base, a fragrance component, and, as a mixed surfactant system, a combination of an amine oxide and a linear alcohol alkoxyate.

Appealed claims 1-24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Steer, considered alone, or in view of Rosen. Claim 23 stands separately rejected under 35 U.S.C. § 103 as being unpatentable over Steer in view of Streit.

Appellants submit at page 2 of the Brief that "[t]he claims stand and fall together." Accordingly, all the appealed claims stand or fall together with claim 1, and we will limit our consideration to the examiner's rejection of claim 1. We note that appellants have not addressed the examiner's separate rejection of claim 23.

We have thoroughly reviewed each of appellants' arguments for patentability. However, we are in complete agreement with the examiner's reasoned analysis and application of the prior art, as well as his cogent disposition of the arguments raised by appellants. Accordingly, we will adopt the examiner's reasoning as our own in sustaining the rejections of record, and we add the following for emphasis only.

There is no dispute that Steer, like appellants, discloses a gel-form air freshener composition comprising the presently claimed aqueous gel base, fragrance component, and a surfactant that may include appellants' linear alcohol alkoxyate or amine oxide. As appreciated by the examiner, Steer does not expressly teach the claimed combination of an alcohol alkoxyate and an amine oxide. However, the examiner is on sound footing in applying the well-settled principle that it is a matter of prima facie obviousness for one of ordinary skill in the art to combine two or more ingredients in the same composition when each was used in the prior art for the same purpose. In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980). In the present case, since Steer specifically teaches that the surfactant for a gel-form air freshener comprising an aqueous gel base and a fragrance component can be chosen from linear alcohol

alkoxylates and amine oxides, the examiner properly concluded that it would have been obvious for one of ordinary skill in the art to employ the mixed surfactant system in the gel-form air freshener of Steer.

The principal argument advanced by appellants is that since Steer uses a surfactant to reduce the interfacial tension between the liquid and a gas component, and appellants' composition does not require a gas component, there would have been no need for one of ordinary skill in the art to employ the surfactant in the present composition. However, as explained by the examiner, appealed claim 1, by virtue of the "comprising" language, is "open" to the inclusion of a gaseous component. Since the appealed claims are sufficiently broad to encompass compositions comprising a gaseous component, the examiner properly reasons that appellants' argument is not germane to the degree of protection sought by the appealed claims. We note appellants' acknowledgment that "it is true that the claimed invention does not explicitly exclude the use of a gas component" (page 4 of Brief, last paragraph). Also, appellants have not refuted the examiner's reasoning that "[e]ach of the disclosed surfactants would be expected to function as a surface-active or foaming agent, ie, reducing the interfacial tension between liquid/liquid

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or liquid/gas" (page 9 of Answer, second paragraph). In addition, the facts underlying the decision in Ex parte Wittpenn, 16 USPQ2d 1730 (BPAI 1990), cited by appellants, are not controlling here.

Appellants also maintain that "[t]he Steer reference provides no disclosure which would motivate one skilled in the art to wish to employ, **in combination**, an alkoxyate alcohol and an amine oxide, in its gel based formulation, as opposed to any of the **numerous** surfactant candidates both taught and suggested by the Steer reference" (page 5 of Brief, third paragraph). However, it is by now axiomatic that it is prima facie obvious for one of ordinary skill in the art to choose some from among many indiscriminately as long as all the components are taught to have the same utility. In re Susi, 440 F.2d 442, 446 169 USPQ 423, 426 (CCPA 1971). Although appellants may establish nonobviousness by proffering objective evidence of nonobviousness, such as unexpected results, the examiner correctly points out that no such evidence has been presented by appellants to rebut the prima facie case of obviousness.

Furthermore, appellants have not addressed the examiner's finding, stated in both the final rejection and the answer, that the claim language "not more than about 7% by weight" and "not

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more than about 10% by weight" includes **zero** for the amounts of linear alcohol alkoxyate and amine oxide, respectively. Consequently, appealed claim 1 embraces compositions comprising only an aqueous gel base and a fragrance component which, manifestly, would have been obvious to one of ordinary skill in the art in view of the Steer reference.

In conclusion, based on the foregoing and the reasons well-stated by the examiner, the examiner's decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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THOMAS A. WALTZ)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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)	
CATHERINE TIMM)	
Administrative Patent Judge)	

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